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Nos. 10-238 and 10-239

Supreme Court, U.S.
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In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ARIZONA TAXPAYERS ACTION COMMITTEE, DEAN MARTIN, and RICK MURPHY,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TIMOTHY A. NELSON
Chief Deputy Attorney General
MARY R. O'GRADY
Solicitor General
Counsel of Record
JAMES E. BARTON II
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007-2926
(602) 542-3333
Solicitor.General@azag.gov

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the First Amendment's requirement that "Congress shall make no law . . . abridging the freedom of speech" and this Court's cases that prohibit discriminatory, asymmetric limitations on privately funded candidates, but affirm the authority of regulators to seek disclosure in order to prevent corruption, allow the citizens of Arizona to combat the presence and appearance of corruption by establishing a campaign-finance system in which candidates forego private contributions in exchange for accepting various restrictions, including conditioning access to two-thirds of their funds based on the campaign activity that privately funded candidates or independent expenditure groups report.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS TO DENY THE PETITIONS	9
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Bd. of Regents v. Southworth, 529 U.S. 217 (2000) 5

Buckley v. Valeo, 424 U.S. 1 (1976) 1, 5, 10, 13, 16

Citizens United v. F.E.C., 130 S. Ct. 876 (2010) 8, 9, 10, 11, 13

Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) 16

Davis v. F.E.C., 128 S. Ct. 2759 (2008) ..... *passim*

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) 15

Gable v. Patton, 142 F.3d 940 (6th Cir. 1998) 16

Green Party of Conn. v. Garfield, 616 F.3d 213 (2d Cir. 2010) 15

N.C. Right To Life Comm. Fund For Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008) 16

Rosenstiel v. Rodriquez, 101 F.3d 1544 (8th Cir. 1996) 16

Scott v. Roberts, 612 F.3d 1279 (11th Cir. 2010) 14, 15

STATUTES

2009 Ariz. Sess. Laws, ch. 114 5

Ariz. Rev. Stat. § 16-902 12

Ariz. Rev. Stat. § 16-905 ..... 2, 4, 5, 12

TABLE OF AUTHORITIES – Continued

Page

Ariz. Rev. Stat. § 16-940 ..... *passim*

Ariz. Rev. Stat. § 16-941 ..... 3, 4, 5, 12

Ariz. Rev. Stat. § 16-945 ..... 4, 12

Ariz. Rev. Stat. § 16-946 2

Ariz. Rev. Stat. § 16-951 ..... 2, 3

Ariz. Rev. Stat. § 16-952 ..... *passim*

Ariz. Rev. Stat. § 16-954 ..... 5, 14

Ariz. Rev. Stat. § 16-959 2

Ariz. Rev. Stat. § 16-961 ..... 2, 4, 12

Federal Election Campaign Act 1

STATEMENT OF THE CASE

1. Responding to the practice of exchanging large campaign contributions for political favors, the United States enacted the Federal Election Campaign Act ("FECA"). *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). This Court explained that "[a]lthough the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate[d] that the problem [wa]s not an illusory one." *Id.* at 27. This Court approved of the government's using disclosure requirements as a tool to deter corruption and "public financing of Presidential elections as a means to reform the electoral process . . . ." *Id.* at 67, 90. It further held that the federal public-funding system was a "congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93.

2. In 1998, Arizona voters passed the Citizens Clean Elections Act (the "Act"). In passing the initiative, Arizona voters declared that at the time Arizona's election-financing system "[a]llow[ed] Arizona elected officials to accept large campaign contributions from private interests *over which they ha[d] governmental jurisdiction*; . . . [u]ndermine[d] *public confidence in the integrity of public officials*; . . . [and] [c]ost[] average taxpayers millions of dollars in the form of *subsidies and special privileges for campaign contributors*." Arizona Revised Statutes ("A.R.S.")

§ 16-940. (emphasis added). The Act made it possible for state candidates to finance their campaigns with money from a public fund that the Act established, thus eliminating the possibility of actual quid pro quo corruption and the appearance of such corruption among participating candidates.

3. The Act establishes the maximum amount of money available to candidates participating in the Clean Elections system. For example, candidates seeking their party's nomination for governor in the primary election can spend no more than approximately $1,900,000.[1] A.R.S. §§ 16-961(G)(5), -952(E). Participating candidates do not, however, automatically receive the maximum amount of funds available. Before being eligible to receive Clean Elections funds, candidates must demonstrate that sufficient voter interest exists in their candidacy by collecting a designated number of $5 qualifying contributions. A.R.S. § 16-946. A candidate who has no opponent in either the primary or general election receives only an amount equal to five dollars for each qualifying contribution that the candidate submitted to the Clean Elections Commission. A.R.S. § 16-951(A)(3). A candidate who has an opponent receives an initial grant equal to the initial spending limit, which is

[1] Pursuant to A.R.S. §§ 16-905(H) and 16-959(A), the Secretary of State adjusts the dollar amounts in the Clean Elections Act and the Elections Code for inflation. For simplicity, this brief will cite the initial values that the Act provided without regard to inflationary adjustments.

one-third of the full grant, regardless of the activity in that candidate's race. A.R.S. § 16-951(A)(1). For gubernatorial primaries, participating candidates receive an initial grant of approximately $640,000. The Commission distributes the remaining two-thirds through matching funds only if there is sufficient activity in the candidate's race to justify releasing the funds. A.R.S. § 16-952. If the participating candidate's opponents – either nonparticipating candidates or independent expenditure groups – spend or raise more than an amount equal to the initial grant, the candidate is given matching funds that are roughly equal to the opponents' expenditures until the candidate has received the full grant.[2] A.R.S. § 16-952.

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[2] During the primary election, participating candidates begin receiving matching funds once the sum of expenditures by their nonparticipating primary opponents, minus six percent to account for fundraising costs, and expenditures by independent expenditure groups exceeds the sum of the initial primary election spending limit and the amount of early contributions that the participating candidate has collected. A.R.S. § 16-952 (A), (C). During the general election, participating candidates begin receiving matching funds once the sum of the funds that their nonparticipating general election opponents raise, minus six percent to account for fundraising costs, and the expenditures by independent expenditure groups exceeds the initial general election spending limit. A.R.S. § 16-952 (B), (C). As the participating candidates receive matching funds, the spending limit is adjusted by an amount equal to the matching funds; this new spending limit is used for future matching-funds calculations until the maximum spending limit is reached. A.R.S. § 16-952 (A), (B), (E). After the participating candidates reach the maximum spending limit, they receive no more funding from any source. A.R.S. §§ 16-952 (E), -941.

Under no circumstances will a participating candidate receive more than the full grant. *Id.* The candidate may not raise private money to match money that the candidate's opponents have raised or spent above and beyond the full grant amount. A.R.S. § 16-941.

Participating candidates agree to other restrictions in addition to having their access to two-thirds of the full grant of public money conditioned on their opponents' activities. For instance, they can raise only limited funds from private contributions. Gubernatorial candidates, for example, can raise only $40,000 in early contributions. A.R.S. § 16-945. Also, they can do so only during the qualifying and exploratory periods, which end shortly before the primary. *Id.*; A.R.S. § 16-961(B)(2), (3). Furthermore, candidates may accept private contributions only from individuals, and each contributor may give no more than $100. A.R.S. §§ 16-941, -945. Candidates may not accept money from a political party or from political action committees. A.R.S. § 16-941(A)(1). By contrast, nonparticipating candidates have no limit on the total amount of funds that they may raise from private donors, and they are free to raise private money during the entire campaign. A.R.S. § 16-905 (listing limits on nonparticipating candidates). Nonparticipating candidates may accept money from political parties or political action committees. *Id.* A nonparticipating candidate for governor may accept contributions of up to $808 from individuals, which is eight times the limit imposed on participating candidates.

A.R.S. §§ 16-905(A), -941(B). Participating candidates agree to spend no more than $1000 of their personal money on their campaigns. A.R.S. § 16-941(A)(2). There is no limit on the amount of personal money that nonparticipating candidates may use on their own campaigns. 2009 Ariz. Sess. Laws, ch. 114 (striking the reporting requirements for candidates using personal money). The Act requires of nonparticipating candidates only that they report the contributions that they receive and the expenditures that they make so that the Commission may give participating candidates access to additional funding up to the full grant amount. A.R.S. § 16-941(B).

Petitioners John McComish, Nancy McLain, and Tony Bouie ("McComish Petitioners") wrongly claim that they must fund and disseminate speech that rebuts their positions. *See, e.g.*, McComish Pet. at 10 ("[r]eeling from a deluge of hostile speech financed by his campaign expenditures"), 17 ("Arizona's matching-funds trigger effectively forces traditional candidates and their supporters to disseminate hostile speech . . . ."). Arizona voters created the Clean Elections Fund from money received from a voluntary tax check-off box, tax-credit donations, and a surcharge on fines and penalties. A.R.S. § 16-954 (A)-(C). Nonparticipating candidates have no part in funding or distributing the message of participating candidates. *See Buckley v. Valeo*, 424 U.S. 1, 91 n.124 (1976) (holding that tax check-offs do not create a system that involves compelled speech); *Bd. of Regents v. Southworth*, 529 U.S. 217, 230 (2000) (holding that

the university's collecting fees used to promote "the free and open exchange of ideas by, and among its students," did not amount to compelled speech, so long as the program satisfied "the viewpoint neutrality requirement").

4. Since Arizona voters approved the Clean Elections program in 1998, the public-funding option has become an integral part of Arizona's campaign-finance system. This system has been used in every state election since 2000. In the elections since 2002, fifty-two percent to sixty-seven percent of the candidates for state offices have run as participating candidates. Resp. to 2d Renewed Application for Stay at App. 15.

5. a. The McComish Petitioners filed their Complaint against the Arizona Secretary of State and the members of the Arizona Clean Elections Commission on August 21, 2008. The Complaint sought to deny their opponents access to two-thirds of the funds made available to participating candidates and thus to limit their opponents' exercise of political speech. The district court permitted Petitioners Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Dean Martin, and Rick Murphy ("PAC Petitioners"), who were parties to a separate challenge, to intervene in this action. The PAC Petitioners' complaint asserted claims similar to those that the McComish Petitioners' complaint did. The basis of the McComish Petitioners' and the PAC Petitioners' (collective "Petitioners") objection was that conditioning the distribution of two-thirds of the

total grant on the activities of nonparticipating candidates and of those making independent expenditures had a chilling effect on Petitioners' spending because it caused them to avoid or delay spending to prevent participating candidates from receiving more than the initial grant – that is, more than the one-third of the total funds available to participating candidates.

b. On January 20, 2010, the district court entered an order granting Plaintiffs' motions for summary judgment, denying Defendants' motions for summary judgment, and enjoining enforcement of the Act's matching-funds provision, A.R.S. § 16-952. McComish Pet. App. 47-80. Even in granting summary judgment for Plaintiffs, the district court found no definitive evidence that matching funds in fact deter spending in Arizona, *Id.* at 54, and recognized that it was "illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on Plaintiffs," *Id.* at 66. Furthermore, after acknowledging that if Arizona simply provided the full grant to each participating candidate, there would be no question of the Act's constitutionality, the district court noted that "[i]f a single lump sum award would not burden Plaintiffs' free speech rights in any cognizable way, finding a burden solely because of the incremental nature of the awards seems difficult to establish." *Id.* at 66-67. The district court, however, concluded that "[d]espite the unsettling nature of Plaintiffs' claims, *Davis* [*v. F.E.C.*, 128 S. Ct. 2759 (2008),] requires this Court find Plaintiffs have

established a cognizable burden." *Id.* at 67. The district court also believed that, notwithstanding these findings, the Supreme Court's decision in *Davis* required it to hold that matching funds are subject to strict scrutiny. *Id.* at 69. Despite the Act's anticorruption purpose, the district court concluded that matching funds are not narrowly tailored to advance a compelling interest and therefore do not satisfy strict scrutiny. *Id.* at 72.

c. The Ninth Circuit reversed. The court of appeals analyzed the matching funds provision as though it affected fully protected speech because it impacted both contributions and expenditures. McComish Pet. App. 23. Turning to the level of burden the provision placed on Petitioners' speech, the court of appeals recognized that this case is unlike *Davis*, writing that "the law in *Davis* was problematic because it singled out the speakers to whom it applied based on their identity. The Act's matching-funds provision makes no such identity-based distinctions." McComish Pet. App. 28. Rather, the Act placed an "indirect or minimal" burden on Petitioners' speech. *Id.* Furthermore, "[a]lthough Plaintiffs [could] not point to any specific instance in which their speech has been chilled by the Act," the court of appeals recognized the potential for "a theoretical chilling effect on donors." *Id.* at 32, 34. Thus based on this Court's holding in *Citizens United v. F.E.C.*, 130 S. Ct. 876 (2010), the court of appeals examined the matching funds provision under intermediate scrutiny. *Id.* The court of appeals noted this Court's holding

that "the State's interest in eradicating the appearance of *quid pro quo* corruption to restore the electorate's confidence in its system of government is not 'illusory,' it is substantial and compelling." *Id.* at 35. The court of appeals also found that "the State has an interest in providing matching funds to encourage participation in its public funding scheme." *Id.* Finally, the court of appeals rejected the district court's reasoning that this interest was mitigated when a publicly financed candidate was running against a self-funded candidate because "[i]t is not relevant under this analysis what the source of a nonparticipating candidate's campaign contribution is when he or she triggers matching funds." *Id.* at 37. Thus, the court of appeals held that "matching funds bear a substantial relation to the State's anticorruption interest." *Id.* In his concurrence, Judge Kleinfeld agreed that the Act passed constitutional muster, but reasoned that Arizona's public-financing system simply imposed "no limitations whatsoever on a [nonparticipating] candidate's speech." *Id.* at 39.

REASONS TO DENY THE PETITIONS

This Court should deny the Petitions for Certiorari because the court of appeals correctly rejected Petitioners' First Amendment challenges to Arizona's matching-funds provision. Also, the Court should deny the Petitions because the alleged circuit split is the result of peculiarities of various state

public-financing systems, rather than the application of incompatible rules of law.

1. Contrary to the Petitioners' contention, the court of appeals' opinion correctly applied this Court's holdings in *Buckley*, *Davis*, and *Citizens United*. In *Davis* this Court found that a discriminatory rule for similarly situated speakers imposed a substantial burden and could stand only if it survived strict scrutiny. 128 S. Ct. at 2772. The Court made it clear that absent this asymmetric burden "Davis' argument would plainly fail." *Id.* at 2771. Thus, the Ninth Circuit correctly applied *Davis* in finding that where there is no discriminatory rule, as in subjecting candidates "to entirely different regulatory schemes when some candidates voluntarily choose to participate in public financing," a provision should be analyzed under intermediate scrutiny. McComish Pet. App. 27. Analyzing the Millionaire's Amendment in *Davis*, this Court also found that the government's interest, leveling the playing field, was not a compelling interest. *Id.* at 2773-74. By contrast, this Court has repeatedly recognized that preventing corruption is an important or a substantial governmental interest. *Buckley*, 424 U.S. at 80-81; *Davis*, 128 S. Ct. at 2770; *Citizens United*, 130 S. Ct. at 901-02. For that reason, the Ninth Circuit correctly concluded that the State's interest in this case was an important one. McComish Pet. App. 35. Given the insubstantial burden and important governmental interest this case presents, the court of appeals properly applied *Buckley* and *Citizens United* in determining that

"there is a 'substantial relation' between the Act's matching-funds provision and 'a sufficiently important governmental interest[ ]' [to] conclude that it does not violate the First Amendment." McComish Pet. App. 25, 34 (quoting *Citizens United*, 130 S. Ct. at 914) (internal quotation marks omitted).

a. Petitioners' claims rest on the notion that this Court's ruling in *Davis* disallows the matching-funds component of Arizona's public-funding system because the availability of those funds to participating candidates is conditioned on the activity of non-participating candidates or independent expenditure groups. *See, e.g.*, McComish Pet. at 32-33; Ariz. Free Enterprise Club's Freedom Club PAC Pet. ("PAC Pet.") at 29-34. The first problem with this analysis is that Arizona's matching-funds provision, unlike *Davis*'s Millionaire Amendment, does not unfairly burden privately funded candidates' or political committees' free speech.

Davis considered a scheme in which one privately funded candidate had a different contribution limit than another privately funded candidate. When a candidate spent more than $350,000 of his personal money on the campaign, he became classified as a self-funded candidate. 128 S. Ct. at 2766, 2770. By virtue of "a new, asymmetrical regulatory scheme," the self-funded candidate's opponent qualified "to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated party expenditures." *Id.* at 2766, 2770.

A side-by-side comparison of the provisions at issue in *Davis* and this case reveals the dramatic differences between the two. In *Davis*, both candidates were privately funded with no expenditure limit; in this case, Petitioners' opponents are publicly funded with expenditure limits set by statute. 128 S. Ct. at 2769; A.R.S. §§ 16-961(G)(5), -952(E). In *Davis*, both candidates could raise funds from private sources during the entire cycle; in this case, Petitioners' opponents may raise funds from private sources only until shortly before the primary election. 128 S. Ct. at 2768-69; A.R.S. §§ 16-945; -961(B)(2), (3). In *Davis*, the contribution limit for those contributing to Davis was one-third the limit of those contributing to his opponent; in this case, Petitioners that are candidates can accept contributions of up to eight times the limit for their opponents, and Petitioners that are political committees can accept unlimited contributions from individuals. 128 S. Ct. at 2766; A.R.S. §§ 16-902.01 (listing requirements for political committees), -905(A), -941(B). In *Davis*, his opponents could accept assistance from their party that was not available to him; in this case, it is the Petitioners who can accept additional assistance from their parties. 128 S. Ct. at 2766; A.R.S. § 16-941(A). The Act does not place a substantial burden on the Petitioners' speech, but establishes two completely separate campaign-finance systems with their own advantages and disadvantages. Accordingly, it should be analyzed under intermediate scrutiny. *Compare Davis*, 128 S. Ct. at 2772 (holding that a provision "impos[ing] a substantial burden on the exercise of the First

Amendment . . . cannot stand unless it is 'justified by a compelling state interest'") (citation omitted) *with Citizens United*, 130 S. Ct. at 914 (upholding a provision that neither imposes a ceiling on campaign activities nor prevents speech so long as the provision bears a substantial relation to a sufficiently important governmental interest) (citation omitted); *see also* McComish Pet. App. 34.

b. The second major flaw in the Petitioners' analysis is that while the Millionaire's Amendment at issue in *Davis* did not serve an anticorruption purpose, the Act's matching-funds provision does. This Court explained that "by discouraging use of personal funds, [the Millionaire's Amendment] disserves the anticorruption interest." *Davis*, 128 S. Ct. at 2773. Because public funds were not at issue in *Davis*, the plaintiff's only alternative was to turn to other private sources. By contrast, the Act enables candidates to run campaigns without private contributions. By eliminating a necessary component of any contributions-for-political-favors scheme, it fights quid pro quo corruption; in the words of the Act, it hopes to save taxpayers "millions of dollars in the form of subsidies and special privileges for campaign contributors." A.R.S. § 16-940. The matching-funds provision encourages candidates to participate in the public-funding system. As the Court of Appeals explained "[b]ecause *Buckley* held that public financing of elections furthers First Amendment values, federal courts have found that states may structure them in

a manner which will encourage candidate participation in them." McComish Pet. App. 35.

The matching-funds provision distributes payments in proportion to activity in a race and is an important part of Arizona's campaign-finance system. If the State provided full grants at the outset of the race, the program would be wasteful and would thus undermine the voter confidence that the Act seeks to restore. *See* A.R.S. § 16-940(B)(5) (illustrating that the Act hopes to restore confidence). Also, if the State provided equal funding in competitive and noncompetitive races, it might not be possible for the Clean Elections Fund to provide sufficient funds to make participation in competitive districts feasible. *See* A.R.S. § 16-954(D)-(F) (recognizing that the fund has limited resources). Disabling the state's response to quid pro quo corruption in these races would deal a major blow to the system's effectiveness. McComish Pet. App. 38. Consequently, the Act and its matching funds provision bear a substantial relation to the State's important anticorruption interest.

2. The alleged circuit split does not warrant reviewing the court of appeals' decision in this case because the difference in applying *Davis* can be attributed to differences in the various campaign-finance systems. For example, the Eleventh Circuit did not address whether Florida's public-funding system would match the expenditures of nonparticipating candidates without limit, or if it was a system like Arizona's that merely provided access to a limited amount of funds. *Scott v. Roberts*, 612 F.3d 1279,

1285-86 (11th Cir. 2010). An unlimited match of funds spent by the privately funded candidate is a more significant burden than a system that is capped. Also, some states use a blended system that requires candidates to accept large amounts of private donations that are a major portion of the total funding for their campaigns, which undermines the anticorruption effect of those systems. *See, e.g.*, *Scott*, 612 F.3d at 1290-98; *Green Party of Conn. v. Garfield*, 616 F.3d 213, 220-22 (2d Cir. 2010). The level of participation is another variable among state cases. It is almost a tautology that a system that allows some candidates to run without accepting private campaign contributions will address the problem of accepting private campaign contributions in exchange for political favors. And while it generally follows directly that encouraging participation in such systems serves the same anticorruption purpose, this is not the case if there is nearly complete participation without matching funds. *See Day v. Holahan*, 34 F.3d 1356, 1361 (8th Cir. 1994) (refraining from deciding whether matching funds served this interest because "candidate participation in public campaign financing [was nearly] 100% *before* enactment of [the matching funds provision]").

The matching funds provisions at issue in the above cited cases did not bear a substantial relation to preventing quid pro quo corruption or the appearance of such corruption due to the specific facts of those cases. Most circuits, on the other hand, have upheld matching funds based on this Court's support

of public financing in *Buckley*. For example, in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, the First Circuit recognized that reporting requirements that helped to administer a capped public-funding system were constitutional. 205 F.3d 445, 451, 466 (1st Cir. 2000); *see also N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 440 (4th Cir. 2008); *Gable v. Patton*, 142 F.3d 940, 947 (6th Cir. 1998); *Rosenstiel v. Rodriquez*, 101 F.3d 1544, 1553 (8th Cir. 1996). This Court need not grant review to resolve a circuit split.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

TIMOTHY A. NELSON
Chief Deputy Attorney General

MARY O'GRADY
Solicitor General
Counsel of Record
JAMES E. BARTON II
Assistant Attorney General

Counsel for Respondents